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August 8, 2016

VIA ELECTRONIC AND FIRST-CLASS MAIL

Mr. Jeff S. Jordan
Assistant General Counsel
Federal Election Commission
Attn: Mary Beth deBeau, Paralegal
999 E Street, N.W.
Washington, DC 20463

Re: MUR 7080—Response of Paul Babeu for Congress (Chris Marston, Treasurer)

Dear Mr. Jordan:

A recent complaint claims that a February 2016 constituent mailer distributed by the Pinal County Sheriff's Office in Arizona caused my client, Paul Babeu for Congress, to receive an unlawful in-kind contribution from the Sheriff's Office "in the form of coordinated communications."¹ This complaint is deeply flawed and should be dismissed immediately.

The complaint's fatal defect is, interestingly enough, acknowledged in the very core of its analysis, when it admits that the "the mailer's contents do not align" with the Commission's "coordinated communication" test.² The Commission does indeed have a well-established test to determine whether a communication like the Sheriff's Office mailer is "coordinated" and therefore treated as an in-kind contribution.³ A basic and crucial part of that test relates to a communication's content: a communication must be an "electioneering communication,"⁴ a republished duplicate of campaign materials,⁵ an "independent expenditure,"⁶ or a communication that references a U.S. House candidate within 90 days of that candidate's election in order to be considered "coordinated."⁷ The complaint is right, then, when it concedes that "the mailer's contents do not align" with the Commission's test. The Sheriff's Office February 2016 mailer is plainly not "coordinated" under Commission-prescribed standards, since

¹ Complaint at 1.

² Complaint at 4.

³ 11 C.F.R. § 109.21.

⁴ 11 C.F.R. § 109.21(c)(1). An "electioneering communication" is a television or radio ad that refers to a candidate and is distributed in the candidate's jurisdiction within 30 or 60 days of the candidate's election. See 11 C.F.R. § 100.29.

⁵ 11 C.F.R. § 190.21(c)(2).

⁶ 11 C.F.R. § 190.21(c)(3). An "independent expenditure" is a communication that expressly advocates a candidate's election or defeat. See 11 C.F.R. § 100.22.

⁷ 11 C.F.R. § 190.21(c)(4)(i).

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it ran more than six months prior to the August 2016 Arizona primary, did not contain any "express advocacy" language, and did not constitute a duplication of any campaign materials.

The complaint attempts to salvage its argument by bizarrely declaring that the Commission's "coordinated communication" test is not determinative when it comes to deciding whether a communication is "coordinated."⁸ This illogical twist conflicts with the Commission's prior statements, however. The Commission has been entirely clear that its test exclusively and "specifically address[es] the meaning of the phrase 'made in cooperation, consultation, or concert, with, or at the request or suggestion of' in the context of communications,"⁹ which is to say that a communication is "coordinated" only if it fully satisfies this test.¹⁰ The test "occupies the field," so to speak, when it comes to deciding whether a disbursement of funds for a communication is "coordinated" under Commission rules. And the undisputed fact that the Sheriff's Office mailer does not meet the Commission's test definitively determines that it is not "coordinated" and not an in-kind contribution to Paul Babeu for Congress.

Even if the Commission were somehow inclined to follow the complaint's suggestion to discard its "coordinated communication" test, the Sheriff's Office mailer still could not be considered an in-kind contribution to Paul Babeu for Congress because the mailer's contents, distribution, and processing demonstrate that the mailer was unrelated to any election. For instance, although the mailer features a brief message from and a few small pictures of Mr. Paul Babeu, the mailer does not in any way mention Mr. Babeu's congressional candidacy and is instead overwhelmingly focused on soliciting volunteer help, providing emergency contact information, offering tips for burglary prevention, and otherwise informing Pinal County residents about Sheriff's Office operations. The mailer's distribution also shows it was created and disseminated without regard to any election, given that it was sent more than six months prior to Arizona's August 2016 primary election to a nonpartisan list¹¹ of Pinal County residents who live both inside and outside the First Congressional District.¹² Finally, the approval process required for the mailer further underscores its non-electoral nature, since the Pinal County Attorney was statutorily required to independently approve the use of seized racketeering funds

⁸ Complaint at 4-5.

⁹ 68 Fed. Reg. 421, 425 (Jan. 3, 2003). A separate coordination definition "addresses expenditures that are not made for communications." 68 Fed. Reg. 421, 425 (Jan. 3, 2003).

¹⁰ 11 C.F.R. § 190.21(b) (stating that a communication is "coordinated" and treated as an in-kind contribution if it meets all three prongs of the Commission's test).

¹¹ The complaint makes much of its unverified claim, which is based on an extrapolation from a small sample, that "some 85% of the mailer's recipients are eligible to vote in the August 2016 Republican primary election." Complaint at 5. The complaint neglects to mention, however, that both Republicans and Independents are eligible to vote in Arizona's Republican primary election. The fact that the complaint's random sampling of names yielded a large percentage that were Republican and Independent is not surprising for Pinal County and provides no grounds for concluding that the list was in any way partisan.

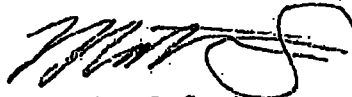
¹² The mailer was sent to Pinal County residents who live outside the First Congressional District, including those in Apache Junction, Bapchule, Florence, Gold Canyon, Sacaton, San Tan Valley, and Queen Valley. Mailers were also not sent to individuals outside Pinal County, though the First Congressional District extends to other Arizona counties.

for this outreach.¹³ The Pinal County Attorney duly provided this approval and subsequently offered this public statement about the Sheriff's Office mailer:

The Pinal County Sheriff's Office newsletter appears to be a great use of RICO funds. Aside from the newsletter providing community outreach and being educational, it works as an excellent recruitment tool to bring volunteers and serious applicants who wish to join the Pinal County Sheriff's Office.¹⁴

In the end, neither the law nor the facts support the complaint's allegations. The Sheriff's Office mailer was a Pinal County Attorney-approved outreach effort to a nonpartisan list of County residents that provided important information and sought volunteers from the community. The mailer did not mention Mr. Babeu's congressional candidacy in any way, and the mailer did not even come close to qualifying as a "coordinated communication" under the Commission's established test. The Commission should therefore find no reason to believe that a violation occurred and dismiss this Matter.

Respectfully Submitted,



Matthew T. Sanderson
Member
Caplin & Drysdale, Chartered

¹³ Ariz. Rev. Stat. § 13-2314.03.

¹⁴ David Biscobing, *Conservative Watchdog Goldwater Institute Wants Answers about Babeu's RICO Spending*, ABC15.com (Feb. 23, 2016) (providing a statement of Pinal County Attorney Lando Voyles), available at <http://www.abc15.com/news/local-news/investigations/conservative-watchdog-goldwater-institute-wants-answers-about-babeus-rico-spending>.

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